STATE OF MICHIGAN

IN THE SUPREME COURT

CARRIER CREEK DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant.

UNPUBLISHED
November 3, 2005

No. 255609
Eaton Circuit Court
LC No. 03-000067-CC

T. Eveland

CARRIER CREEK DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

ECHO 45, L.L.C.,

Defendant-Appellant.

No. 255610
Eaton Circuit Court
LC No. 03-000068-CC

30125-7

AMC

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28759

CARRIER CREEK DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant,

and

STANDARD FEDERAL BANK, f/k/a
MICHIGAN NATIONAL BANK,

Defendant-Appellee.

No. 255611
Eaton Circuit Court
LC No. 03-000069-CC

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APPLICATION FOR LEAVE TO APPEAL

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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. DOES MCL 213.55(3) REQUIRE NOTICE THAT A LANDOWNER WILL SEEK JUST COMPENSATION FOR A TAKING OF PROPERTY BASED UPON A HIGHER AND BETTER USE IN ACCORDANCE WITH A POTENTIAL REZONING OF THE PROPERTY?

The trial court has answered this question "Yes."

The Court of Appeals has answered this question "Yes."

The Defendants–Appellants contends the answer is "No."

II. DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS NO DAMAGE TO THE REMAINING PROPERTY ON THE PARCELS OWNED BY DEFENDANT LAND ONE, LLC?

The trial court would answer this question "No."

The Court of Appeals has answered this question "No."

The Defendants–Appellants contend the answer is "Yes."

THE ORDERS APPEALED FROM AND RELIEF SOUGHT

This application for leave to appeal has arisen from three condemnation actions filed in the Eaton County Circuit Court in January of 2003. In those actions, Plaintiff–Appellee Carrier Creek Drain Drainage District has condemned property owned by Defendant–Appellants Land One, LLC and Echo 45, LLC for a drainage improvement project involving the Carrier Creek and Moon and Hamilton Drains in Delta Township. In the circuit court, the three cases were given docket numbers 03-67-CC, 03-68-CC, and 03-69-CC, and assigned to the Honorable Thomas S. Eveland, Circuit Judge.

The three actions were consolidated for trial in the circuit court, and a non-jury trial as to the issue of just compensation was conducted over six days between October 13, 2003 and November 18, 2003. At the conclusion of the trial proceedings on November 18, 2003, the trial court took the cases under advisement, and subsequently issued separate written opinions, stating its findings and award of just compensation for each of the three parcels, on January 26, 2004.[1] A "Final Judgment and Order for Payment of Just Compensation, Statutory Interest, Witness Fees, Attorney Fees and Expenses" was entered in each case on April 28, 2004, in accordance with the findings pronounced in the Opinions of January 26, 2004.[2]

In each of these cases, the Defendants–Appellants claimed an appeal to the Michigan Court of Appeals from the final Judgment entered on April 28, 2004. The claim of appeal was

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[1] Copies of the trial court's Opinions of January 26, 2004 are submitted herewith as Appendices "A," "B, and "C."

[2] Copies of the final judgments entered on April 28, 2004 are submitted herewith as Appendices "D," "E, and "F."

timely filed, in each case, on May 19, 2004. Accordingly, the Court of Appeals had jurisdiction of these appeals pursuant to MCL 600.308(1)(a), MCR 7.203(A)(1), and MCR 7.204(A)(1)(a).

Defendants raised three issues in their appeal to the Court of Appeals. In their first issue, Defendants contended that the trial court erroneously refused to consider evidence supporting Defendant Echo 45, LLC's claim that the highest and best use of its property would be use for professional office purposes, and that this property should therefore be valued in accordance with that use in determining the value of the property taken and the reduction in the value of its remaining property. This refusal was based upon the trial court's finding that Defendant's proposed valuation of the property in accordance with this potential higher and better use was a claim which should have been disclosed to the condemning authority pursuant to MCL 213.55(3), and was therefore barred by Defendant's failure to do so.[3]

In their second issue, Defendants challenged the trial court's finding that there was no damage to the remaining property on the parcels owned by Defendant Land One, LLC, contending that this finding was clearly erroneous in light of the overwhelming evidence that considerable portions of these properties were rendered inaccessible or entirely useless by the taking. In their third issue, Defendants contended that the trial court had abused its discretion in denying their delayed request for jury trial.

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[3] The trial court's ruling on this issue was made in a written Opinion granting Plaintiff's motion in limine to exclude Defendants' evidence supporting this claim, entered on September 17, 2003. A written Order granting Plaintiff's motion in limine for the reasons stated in its Opinion of September 17, 2003 was subsequently entered on September 30, 2003. respectively. Copies of these are submitted herewith as Appendices "G" and "H."

On November 3, 2005, the Court of Appeals (Judge Brian K. Zahra, Presiding, and Judges Mark J. Cavanagh and Donald S. Owens) affirmed the trial court's judgments in a *Per Curiam* Opinion which rejected each of the Defendants' claims of error.[4]

With regard to Defendant Echo 45, LLC's claim for compensation based upon potential rezoning of its property, the Court of Appeals acknowledged that a landowner is entitled to such compensation if there is a "reasonable possibility of rezoning," but affirmed the trial court's decision, expressing its conclusion that Defendant's claim was a claim for "compensable damages" which should have been disclosed pursuant to MCL 213.55(3):

> "Echo's claim is a "possibility of rezoning" claim. A landowner is entitled to compensation for the "possibility of rezoning" if "a reasonable possibility exists, absent the threat of condemnation, that the zoning classification of the condemned property would have been changed." *Hartland Twp v Kucykowicz*, 189 Mich App 591, 596; 474 NW2d 306 (1991), citing *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). In other words, because the possibility of rezoning affects the price that a willing buyer would have offered for the property prior to the taking, it is compensable if proved. See *Dep't of Transportation v VanElslander*, 460 Mich 127, 130; 594 NW2d 841 (1999).
>
> "Echo argues that the claim merely involves a valuation dispute and is not a claim of compensable damage flowing from the taking. That argument is without merit. The plain and ordinary meaning of "compensable damage" is loss, harm, or injury which is eligible for compensation. Here, Echo is claiming that a willing buyer would have purchased this residentially zoned property for a professional office use and, thus, it was deprived of the increased value associated with that possible zoning change as a consequence of the taking. So, Echo intended to claim a right to just compensation for the loss of value of the possibility of rezoning as a consequence of the taking, which was not included in the good faith offer. Thus it is clearly a claim for compensable damage that was required, under MCL 213.55(3), to be disclosed within the time limits set forth in the statute. Therefore, the trial court properly excluded evidence of this undisclosed claim."
>
> (Opinion – Appendix "I"- pp. 3-4)

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[4] A copy of the Court of Appeals' Opinion is submitted herewith as Appendix "I." The Plaintiff has filed a request for publication of the Court of Appeals' Opinion pursuant to MCR 7.215(D). A copy of that request is submitted herewith as Appendix "J."

Defendants–Appellants now seek leave to appeal the aforementioned trial court judgments, and the decision of the Court of Appeals affirming them, to this Honorable Court pursuant to MCR 7.302. They respectfully request that the Court grant their application for leave to appeal, or other appropriate peremptory relief in lieu of granting leave to appeal. Specifically, Defendants request that this Court reverse the erroneous decisions of the trial court and the Court of Appeals, and that this case be remanded to the trial court for a new trial with appropriate instructions.

For all of the reasons discussed in greater detail *infra*, Defendants respectfully contend that the trial court and the Court of Appeals have seriously misconstrued the notice provision of MCL 213.55(3). That provision does not require notice that a landowner will seek just compensation for a taking of property based upon a higher and better use in accordance with a potential rezoning of the property. The erroneous holdings of the lower courts to the contrary are inconsistent with the plain language of the statute and the evident legislative intent.

The erroneous exclusion of this important evidence has denied Defendant Echo 45, LLC a fair valuation of its property, resulting in a grossly deficient award of just compensation. Thus, the erroneous decisions of the lower courts will cause a serious injustice to this Defendant if this Court does not grant leave to appeal or other appropriate peremptory relief. Moreover, because Plaintiff has requested publication of the Court of Appeals' decision, the erroneous statutory interpretation espoused therein will cause the same injustice in future cases brought against other landowners if that request is granted. For these reasons,

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it is also evident that the issues presented in this application involve issues of major significance to Michigan's jurisprudence.[5]

The trial court's finding that there was no compensable damage to the remainder on the parcels owned by Defendant Land One, LLC was also clearly erroneous, in light of the overwhelming evidence that considerable portions of these properties were rendered inaccessible or entirely useless by the taking. This, also, will cause a material injustice if this Court does not grant leave to appeal or other appropriate peremptory relief.

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[5] Plaintiff's request for publication has acknowledged that this issue is of major significance to the jurisprudence of the state. It states that "Because the Opinion construes and clarifies a key provision of the Uniform Condemnation Procedures Act and involves a legal issue likely to reoccur in subsequent eminent domain cases, we believe its publication is strongly supported by the criteria set forth in MCR 7.215(B)" (Appendix "J" p. 2)

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

THE PROPERTIES INVOLVED

The three parcels of property involved in these cases were owned by Defendants Land One, LLC, and Echo 45, LLC, both of which are owned by real estate developer Michael G. Eyde. The property at issue in Case No. 03-67-CC consisted of two adjoining parcels (divided by Central Circle Drive) south of Mount Hope Highway in Delta Township. That property, owned by Defendant Land One, LLC, is on the South Branch of the Carrier Creek, and has been zoned for industrial use. By this condemnation action, the Eaton County Drain Commissioner has taken four easements on this property – a drain easement, a bypass drain easement, an overflow drain easement, and a flooding easement.[6]

The property at issue in Case No. 03-69-CC, also owned by Defendant Land One, LLC, was zoned for commercial use. That property, also on the South Branch of the Carrier Creek, lies west of Creyts Road between Mount Hope Highway and Interstate 496 in Delta Township. By this condemnation action, the Eaton County Drain Commissioner has taken two easements on this property – a drain easement and a flooding easement. The Drain Commissioner has also taken a fee simple estate in a piece of property approximately 7.16 acres in size, located in the northwest corner of this parcel.[7]

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[6] The easements taken by condemnation in Case No. 03-67-CC are described and illustrated by the Description of Taking and drawings provided as attachments to the "Order Waiving Necessity, Vesting Title, and for Possession of Property" entered in that case on March 25, 2003. A copy of that Order, with its attachments, is submitted herewith as Appendix "K."

[7] The property and easements taken by condemnation in Case No. 03-69-CC are described and illustrated by the Description of Taking and drawings provided as attachments to the "Order Waiving Necessity, Vesting Title, and for Possession of Property" entered in that case on March 25, 2003. A copy of that Order, with its attachments, is submitted herewith as Appendix "L."

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The property at issue in Case No. 03-68-CC, owned by Defendant Echo 45, LLC, was zoned for residential use. That property is located to the west of the other properties on the Moon and Hamilton Drain, east of Canal Road between Mount Hope Highway and Interstate 496 in Delta Township. By this condemnation action, the Eaton County Drain Commissioner has taken a fee simple estate in a piece of property approximately 13.5 acres in size, covering the entire width of the parcel, adjacent to Interstate 496.[8]

THE PRETRIAL PROCEEDINGS

The Plaintiff's Complaint in each of these cases was filed in the Eaton County Circuit Court on January 14, 2003. In each of these cases, the Defendants filed their Answer, together with a "Motion Contesting Necessity of the Taking" on or about February 14, 2003. These motions were scheduled for hearing before the court on March 25, 2003, but no hearing was held on that date. Without Mr. Eyde's knowledge or consent, Defendants' original trial counsel agreed to waive the scheduled hearing on the necessity issue. A written Order Waiving Necessity, Vesting Title and for Possession of Property (Appendices "K," "L," and "M") was entered in each case later that day.

A motion to set aside the Orders of March 25, 2003 was subsequently filed after Mr. Eyde learned that the hearing on necessity had been waived by Defendants' original trial counsel without his knowledge or consent, and in violation of his specific instructions to contest the necessity for the taking. This motion, entitled "Motion to Set Aside Order and Evidentiary Hearing for Necessity/Public Purpose/Public Use" was filed with the trial court

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[8] The property taken by condemnation in Case No. 03-68-CC is described and illustrated by the Description of Taking and drawing provided as attachments to the "Order Waiving Necessity, Vesting Title, and for Possession of Property" entered in that case on March 25, 2003. A copy of that Order, with its attachments, is submitted herewith as Appendix "M."

by Defendants' original trial counsel on or about July 7, 2003. In that motion, Defendants' original trial counsel acknowledged that he did not have authority to waive the hearing on necessity, and requested that the court set aside its Orders of March 25, 2003 and conduct a hearing on the issue of public necessity.

An evidentiary hearing was conducted on July 21, 2003 in regard to Defendants' motion to set aside the Orders of March 25, 2003. At the hearing, Defendant's original trial counsel again acknowledged that he had no authority to waive the scheduled hearing on necessity. (Evidentiary Hearing Transcript, 7-21-03, p. 6, 40)

Mr. Eyde, the sole member of each of the Defendant LLCs, testified that he had directed his counsel to contest the necessity for the takings upon receiving the complaints filed in these matters, and confirmed that he had never authorized his counsel to waive the scheduled hearing on the issues of public use or necessity. (Evidentiary Hearing Transcript, 7-21-03, p. 43-47, 58) Mr. Eyde testified that his original trial counsel had informed him, after the hearing date, that Judge Eveland had decided not to hold a hearing because he had already found necessity. (Evidentiary Hearing Transcript, 7-21-03, pp. 69-70) Upon hearing this, Mr. Eyde asked his original trial counsel to file a motion for reconsideration of that decision.

Mr. Eyde testified that he was subsequently told, by his counsel, that a motion for reconsideration had been filed. (Evidentiary Hearing Transcript, 7-21-03, pp. 62, 66, 69-72, 75) Mr. Eyde identified a copy of a motion for reconsideration, signed and sent to him by his counsel, with supporting brief and proof of service dated April 2, 2003. These were admitted as Defendant's Exhibit 9. (Evidentiary Hearing Transcript, 7-21-03, pp. 71-72, 75, 82)

Mr. Eyde later discovered that in fact, no such motion had been filed with the court. When no decision was forthcoming, Mr. Eyde investigated the matter himself and discovered,

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near the end of June, that his original counsel had not filed a motion for reconsideration as he had claimed. (Evidentiary Hearing Transcript, 7-21-03, pp. 71-80) At Mr. Eyde's insistence, the motion to set aside the March 25, 2003 was promptly filed on or about July 7, 2003.

During the hearing of July 21, 2003, the trial court allowed the parties to present evidence pertaining to the issues of public necessity and the public purpose/use claimed as justification for the takings in these cases.[9] Defendants maintained that the Plaintiff did not sustain its burden of proving that the taking was for a public purpose or use because the evidence presented during the evidentiary hearing of July 21, 2003 demonstrated that the project was undertaken primarily for the benefit of General Motors Corporation, a private entity.

After hearing the testimony and the arguments of counsel, the trial court took Defendants' motion under advisement. (Evidentiary Hearing Transcript, 7-21-03, p. 215) The court subsequently rejected Defendant's challenge to the public necessity for the taking in a written Opinion issued on July 25, 2003. An Order Denying Motion to Set Aside Order of Necessity was entered on August 11, 2003, and a subsequent motion for reconsideration of that Order was denied by the court's Order of September 17, 2003.

Prompted by his extreme dissatisfaction with the misconduct of his original trial counsel, Mr. Eyde retained Attorney Kirby Albright to serve as trial counsel in these cases. Mr. Albright's motion to allow his substitution as counsel was argued before Judge Eveland, and granted, on July 28, 2003.

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[9] Prior counsel's efforts at that hearing could at best be described as perfunctory, and prior counsel also failed to disclose his concealment from the client and his use of the sham pleadings. For this reason, he was replace in mid-hearing.

On August 27, 2003, the trial court heard arguments on motions brought by both parties. Plaintiff's counsel had filed a Motion in Limine to exclude Defendants' claims and evidence regarding damage to the value of their remaining properties, and any evidence regarding potential rezoning of the Echo 45, LLC property for office use. In his appraisal reports, submitted on June 30, 2003 in accordance with the trial court's Scheduling Order, Defendants' appraiser, Daniel Essa, had included claims for damages to the remainder for all three parcels. For the properties owned by Land One, LLC, Mr. Essa had found that portions of the property not taken had been rendered inaccessible or unusable by the flooding easements taken in those cases. For the parcel owned by Echo 45, LLC, Mr. Essa had found that the taking had diminished the value of the property not taken, lying to the north and east of the Echo Valley Subdivision, because it prevented the development of that property for office use. This conclusion was based upon Mr. Essa's opinion that, although the Echo 45, LLC property was presently zoned for residential use, its highest and best use would be use for office purposes. Accordingly, Mr. Essa felt that, for this parcel, the property taken and the damage to the remainder should be valued as property zoned for office use.

Plaintiff's counsel argued that Defendants' evidence supporting these claims should be excluded because Plaintiff was not given notice of them in accordance with MCL 213.55(3).[10]

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[10] MCL 213.55(3) provides that:

> "**If an owner believes that the good faith written offer made under subsection (1) did not include or fully include 1 or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency**. The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and to determine its value. The owner shall file all such claims within 90 days after the good faith written offer is made pursuant to section 5(1) or 60 days after the complaint is filed, whichever is later. Within 60 days after the date the owner files a written claim with the agency, the agency may ask the court to

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(Motion Hearing Transcript, 8-27-03, pp. 4-10, 19-21, 26-31) Defendants' counsel argued, in response, that the notice requirements of MCL 213.55(3) were inapplicable because Plaintiff's appraiser was required to value all of the properties in accordance with their highest and best use, and because he had actually considered the potential for damages to the remainder in his reports for each parcel and concluded that the amount of compensation that should be paid for damages on each parcel was zero (0). Thus, Defendants' claims for damages to the remainder and the proposed valuation of the Echo 45, LLC parcel for office use in accordance with its highest and best use, were not matters which had been overlooked or partially excluded; they were, instead, points of disagreement between two appraisers offering conflicting opinions on valuation of Defendants' properties and damages. (Motion Hearing Transcript, 8-27-03, pp. 10-19, 22-26)

The trial court took these questions under advisement after hearing the arguments of counsel. (Motion Hearing Transcript, 8-27-03, p. 49) On September 17, 2003, the court

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> compel the owner to provide additional information to enable the agency to evaluate the validity of the claim and to determine its value. For good cause shown, the court shall, upon motion filed by the owner, extend the time in which claims may be made, if the rights of the agency are not prejudiced by the delay. Only 1 such extension may be granted. After receiving a written claim from an owner, the agency may provide written notice that it contests the compensability of the claim, establish an amount that it believes to be just compensation for the item of property or damage, or reject the claim. If the agency establishes an amount it believes to be just compensation for the item of property or damage, the agency shall submit a good faith written offer for the item of property or damage. The sum of the good faith written offer for all such items of property or damage plus the original good faith written offer constitutes the good faith written offer for purposes of determining the maximum reimbursable attorney fees under section 16. If an owner fails to file a timely written claim under this subsection, the claim is barred. If the owner files a claim that is frivolous or in bad faith, the agency is entitled to recover from the owner its actual and reasonable expenses incurred to evaluate the validity and to determine the value of the claim." (Emphasis added)

issued a written Opinion (Appendix "G") granting Plaintiff's Motion in Limine, based upon its finding that Defendants were required to provide notice of their claims for damage to the remainder and potential rezoning for office use within the time prescribed by MCL 213.55(3), and that their claims were therefore barred for failure to do so. A written Order (Appendix "H") granting Plaintiff's Motion in Limine for the reasons stated in the court's Opinion of September 17, 2003 was subsequently entered on September 30, 2003.

Defendants' new trial counsel had filed a Motion for Jury Trial – Late Request, and the trial court also considered that motion on August 27, 2003. After hearing the arguments of counsel, the trial court denied Defendants' delayed request for jury trial. (Motion Hearing Transcript, 8-27-03, pp. 43-48)

THE TRIAL PROCEEDINGS

A non-jury trial as to the issue of just compensation was conducted over six days between October 13, 2003 and November 18, 2003. At the conclusion of the trial proceedings on November 18, 2003, the trial court took the cases under advisement, and subsequently issued separate written opinions, stating its findings and award of just compensation for each of the three parcels, on January 26, 2004. (Appendices "A," "B" and "C")

Defendants' counsel had filed a Motion for Reconsideration of the court's prior Order granting Plaintiff's Motion in Limine. In that motion, Defendants' counsel argued that, if Defendants' claims regarding potential rezoning and damages to the remainder were, indeed, claims which should have been disclosed pursuant to MCL 213.55(3), the disclosure of those claims in the appraisal reports submitted in accordance with the court's Scheduling Order should have been deemed a timely and sufficient disclosure under an extension granted by the court. After hearing the arguments of counsel, Judge Eveland indicated that he would reserve

his decision on Defendants' motion for reconsideration. (Trial Transcript, hereinafter "T." Vol I, pp. 26-38) Judge Eveland later reversed his decision to bar all evidence regarding damages to the remainder, but indicated that he still would not allow evidence concerning potential rezoning of the parcel owned by Echo 45, LLC to allow development for office use. (T. Vol. IV, 50-51)

During the trial, the court heard extensive testimony concerning the value of the condemned property and easements from Plaintiff's appraiser, Robert Vertalka, and Defendants' appraiser, Daniel Essa. The differences in their ultimate opinions as to the value of the encumbered and unencumbered portions of these properties have been well summarized in the trial court's Opinions of January 26, 2004. (Appendices "A," "B," and "C."

Additionally, having reconsidered its original decision to exclude all evidence regarding damages to the remainders, the court heard and considered conflicting testimony concerning damages to the remainders, *i.e.*, reduction or elimination of the value of portions of Defendants' property not taken, with regard to the industrial and commercial parcels owned by Defendant Land One, LLC.

With regard to the industrial-zoned parcel (Case No. 03-67-CC), Defendant Land One, LLC, claimed damages to the remainder in four areas where the proposed flooding easement had caused the areas to become landlocked or unusable. These areas were depicted in yellow on Plaintiff's Exhibit 26.[11] (T. Vol. III, pp. 4-7) It was claimed that the first of these, consisting of an area of approximately .53 acres in the southwest corner of the parcel, had become landlocked by the flooding easement (depicted by a solid blue line), which extended

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[11] A copy of Plaintiff's Exhibit 26 is submitted herewith as Appendix "N."

to the western border of the parcel, making access impossible. Smaller areas of .34 acres and .21 acres had become unusable due to their small sizes and irregular shapes, again due to the encroachment of the flooding easement. The most significant of the four areas was a piece of property totaling 3.16 acres, which had become landlocked by the broad flooding easement extending to the eastern boundary of the property. As depicted in Plaintiff's Exhibit 26 (Appendix "N"), this portion or the property consisted of two areas of 1.12 acres and 1.87 acres, divided by a narrow strip of wetland (depicted by a red broken red line) .17 acres in size.

With regard to the commercially-zoned parcel to the north, (Case No. 03-69-CC), Defendant Land One, LLC, claimed damages to the remainder in one area which had become landlocked. This area was depicted in yellow on Plaintiff's Exhibit 27.[12] (T. Vol. III, pp. 4-7) Defendant Land One, LLC claimed that this area had become landlocked by virtue of the fee taking in the northwest corner of the parcel, which prevented access to the property from the north, and the flooding easement, which prevented access from the east.[13]

Although Plaintiff's appraiser did not agree that these changes constituted a compensable damage to the remainder, he made several very important concessions in his testimony. Mr. Vertalka acknowledged that compensation in condemnation matters must be based upon the highest and best use of the property in question. (T. Vol. II, p. 86) He also acknowledged that in the case of a partial taking, the landowner is entitled to compensation,

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[12] A copy of Plaintiff's Exhibit 27 is submitted herewith as Appendix "O."

[13] Shawn Middleton, one of Plaintiff's project engineers, testified that the present plan called for construction of a dam on the portion of the property taken in fee. Mr. Middleton testified that the plan called for construction of an access road across the top of the dam, but that its use would be limited to the Drain Commissioner and maintenance personnel for dam safety requirements, maintenance, and operation. (T. Vol. III, p. 147)

not only for the property taken, but for any resulting loss of value to his or her remaining property as well. (T. Vol. II, pp. 87-88) Indeed, he acknowledged that evaluation of damage to the remainder was required, in such cases, by the Uniform Standards of Professional Appraisal Practice (USPAP). (T. Vol. II, pp. 101-102) He also acknowledged, in this regard, that there are several factors which can, and should, be taken into account in the case of a partial taking, to determine whether there is damage to the remainder. He acknowledged that these factors include reduction in size, and the shape of the remaining property; reduction of access after the taking; and any change in utility or desirability of the property. (T. Vol. II p. 88)

Mr. Vertalka made another very important concession regarding the specific circumstances of these cases. He freely acknowledged that it was necessary to assume that the condemning agency would make the maximum allowable use of the condemned property. (T. Vol. II, 89-90) Thus, he also acknowledged that, for purposes of determining just compensation for any damage to the remaining property, it was appropriate and necessary to assume that the property within the flooding easements would be flooded at all times. (T. Vol. II, pp. 123-125)

Despite these concessions, Mr. Vertalka opined that there had been no compensable damage to the remaining properties. He acknowledged that access to the .53 acre parcel in the southwest corner of the industrial parcel (Appendix "N") had been impeded by the flooding easement, but felt that Defendant Land One, LLC had been adequately compensated because it had been compensated for the bypass easement, which ran beneath it. (T. Vol. II pp. 130-133) He acknowledged that no compensation had been paid for the two smaller areas to the north (the irregularly shaped .15 acre area and the triangular .21 acre area depicted in

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Appendix "N"), but felt that there had been no compensable damage to those areas because they had little utility before or after the taking. (T. Vol. II, pp. 134-138)

Mr. Vertalka also acknowledged that no compensation had been paid for the significantly larger area (the 3.16 acre area depicted in Appendix "N") in the northern segment of the parcel. (T. Vol. II, 137) At first, he opined that this area was not landlocked, although access would become more difficult. (T. Vol. II, p. 139) He acknowledged, however, that this area could be accessed before the taking by crossing a narrow strip of wetland (depicted by a red broken line in Appendix "N"), and that Mr. Eyde would need to build a bridge, perhaps 75 feet long, to gain access to that area over the flooding easement after the taking. He then acknowledged that this area could be deemed landlocked by virtue of this difficulty of access. (T. Vol. II, pp. 139-141)

Mr. Eyde testified that he has been involved in the development of real estate since 1963. His extensive experience has included development of properties containing wetlands, floodplains and drain easements. (T. Vol. V, pp. 12-15) Based upon his experience, he felt that the four areas depicted in yellow in Plaintiff's Exhibit 26 had been valuable before, but were rendered useless by the taking. (T. Vol. V, pp. 41-43) He noted, specifically, that he did not feel that it would be possible to gain access to the 3.16 acre parcel after the taking. (T. Vol. V, p. 41) He explained that before the taking, a culvert could have been used to cross the narrow wetland area to gain access to this property, whereas a bridge would be required to do so afterward. (T. Vol. V, p. 99)

Mr. Essa expressed his opinion that damages to the remainder should be paid for the aforementioned areas because the flooding easement had made them inaccessible or useless.

(T. Vol. IV, pp. 80, 85-87) Using his valuation figures, Mr. Essa indicated that this would add $211,100 to the total amount to be paid as just compensation. (T. Vol. IV, p. 90)

Mr. Vertalka testified that if the court were to award damages to the remainder for the aforementioned portions of the industrial property not taken, using his valuations of the encumbered and unencumbered property, this would add $128,850.00 to the amount to be paid as just compensation. (T. Vol. III, 17-20)

With regard to the commercially-zoned property at issue in Case No. 03-069-CC, Mr. Essa expressed his opinion that damages to remainder should be awarded for the 4.8 acre area depicted in yellow in Plaintiff's Exhibit 27 (Appendix "O"). Using his valuation figure of $150,000.00 per acre for this unencumbered property, he testified that this would add $720,000.00 to the amount of just compensation to be paid for the commercial property. (T. Vol. IV, 102-103)

Mr. Eyde testified that this 4.8 acre area was accessible, had utilities available, and "would have been really good for hillside development" before the taking. He explained that it would have been possible to gain access to this part of the property by crossing the narrow strip of wetland depicted as a red broken line in Plaintiff's Exhibit 27. (Appendix "O") (T. Vol. V, 62-63) He testified that he could not gain access to this property at all after the taking. (T. Vol. V, 65)

Mr. Vertalka would not concede that access to this property had become impossible, but acknowledged that it was clearly more difficult. (T. Vol. III, p. 41-42) He opined that there was no compensable damage to the remainder with regard to this property because he felt that it had no utility. (T. Vol. III, pp. 38-44, 94-96)

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The trial court did not consider damages to the remainder with regard to the residentially-zoned property at issue in Case No. 03-068-CC in light of its prior ruling on Plaintiff's Motion in Limine, excluding evidence of potential rezoning for office use. This was because the Defendant's claim for damages to the remainder in that case had been based upon its claim that the taking had prevented development of the property not taken for office use. It should be noted, however, that Defendants' counsel did provide an offer of proof with regard to this issue. Mr. Essa testified that he had considered the highest and best use for each of the parcels involved. (T. Vol. IV, p. 111) He testified that, in his opinion, the highest and best use for the Echo 45, LLC property would be professional office building use.[14]

Based upon his investigation, Mr. Essa felt that there was market demand for property to be used for professional office use, and believed that there was a possibility of utilizing the Echo 45, LLC property for that purpose. Based upon his knowledge of the real estate market in Delta Township, it was his opinion that this property should be valued at $125,000 per acre when valued in accordance with its highest and best use as professional office property. (T. Vol. IV, p. 125-127)

Mr. Vertalka testified that he had viewed the Echo 45, LLC property as having a residential potential. (T. Vol. II, p. 78)

Mr. Eyde also felt that the Echo 45, LLC property could be used for a higher and better use than use for residential purposes. (T. Vol. V. pp. 67-68) He testified that, in his opinion, this property would have been suitable for development as an office park by virtue of

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[14] This opinion was also expressed in Mr. Essa's appraisal report, which was admitted as Defendants' Exhibit 17, although the report valued the property as residential property in accordance with the court's ruling that rezoning for office use could not be considered. A copy of Mr. Essa's report is submitted herewith as Appendix "P."

its favorable physical features, including its accessibility from Canal Road; its visibility from, and proximity to, the highway; and the availability of all necessary utilities. (T. Vol. V. pp. 65-70)

THE TRIAL COURT'S JUDGMENTS

As noted previously, Judge Eveland took these matters under advisement at the conclusion of the trial proceedings on November 18, 2003, and subsequently issued separate written opinions, stating his findings and award of just compensation for each of the three parcels, on January 26, 2004. (Appendices "A," "B," and "C") In his Opinions regarding the industrial and commercial-zoned properties owned by Defendant Land One, LLC (Appendices "A" and "C"), Judge Eveland discussed the issue of damage to the remainder, but concluded that an award of damages to the remainder was not warranted in either case.

With regard to the industrial-zoned parcel at issue in Case No. 03-067-CC, Judge Eveland concluded that the property was already affected by wetlands and flood plains, that the taking did not change the basic makeup of the parcels in question, and that accessibility was not affected to the extent of diminishment in value. (Opinion – Appendix "A" – p. 4)

With regard to the commercially-zoned parcel at issue in Case No. 03-069-CC, Judge Eveland found that, given the nature and location of the 4.8 acre area, it did not appear to him that the potential use of the property would change, and that no credible evidence was introduced as to how the use of that property would change because of the taking. Accordingly, he found no damage to the remainder. (Opinion – Appendix "C" – p. 4)

As noted previously, separate Judgments were entered on April 28, 2004, in accordance with the findings expressed in the trial court's Opinions of January 26, 2004. (Appendices "D," "E" and "F")

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THE DECISION OF THE COURT OF APPEALS

As noted previously, Defendants claimed appeals from the trial court's judgments to the Court of Appeals. On November 3, 2005, the Court of Appeals (Judge Brian K. Zahra, Presiding, and Judges Mark J. Cavanagh and Donald S. Owens) affirmed the trial court's judgments in a *Per Curiam* Opinion (Appendix "I") which rejected each of the Defendants' claims of error.

With regard to Defendant Echo 45, LLC's claim for compensation based upon potential rezoning of its property, the Court of Appeals acknowledged that a landowner is entitled to such compensation if there is a "reasonable possibility of rezoning," but affirmed the trial court's decision, expressing its conclusion that Defendant's claim was a claim for "compensable damages" which should have been disclosed pursuant to MCL 213.55(3):

> "Echo's claim is a "possibility of rezoning" claim. A landowner is entitled to compensation for the "possibility of rezoning" if "a reasonable possibility exists, absent the threat of condemnation, that the zoning classification of the condemned property would have been changed." *Hartland Twp v Kucykowicz*, 189 Mich App 591, 596; 474 NW2d 306 (1991), citing *State Hwy Comm'r v Eilender*, 362 Mich 697, 699; 108 NW2d 755 (1961). In other words, because the possibility of rezoning affects the price that a willing buyer would have offered for the property prior to the taking, it is compensable if proved. See *Dep't of Transportation v VanElslander*, 460 Mich 127, 130; 594 NW2d 841 (1999).
>
> "Echo argues that the claim merely involves a valuation dispute and is not a claim of compensable damage flowing from the taking. That argument is without merit. The plain and ordinary meaning of "compensable damage" is loss, harm, or injury which is eligible for compensation. Here, Echo is claiming that a willing buyer would have purchased this residentially zoned property for a professional office use and, thus, it was deprived of the increased value associated with that possible zoning change as a consequence of the taking. So, Echo intended to claim a right to just compensation for the loss of value of the possibility of rezoning as a consequence of the taking, which was not included in the good faith offer. Thus it is clearly a claim for compensable damage that was required, under MCL 213.55(3), to be disclosed within the time limits set forth in the statute. Therefore, the trial court properly excluded evidence of this undisclosed claim."

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(Opinion – Appendix "I"- pp. 3-4)

Defendants–Appellants now seek leave to appeal the aforementioned trial court judgments, and the decision of the Court of Appeals affirming them, to this Honorable Court pursuant to MCR 7.302.

Additional pertinent facts will be discussed in the body of the Legal Argument, *infra*, to the extent that such discussion may be warranted to fully inform the Court as to the issues raised in this application.

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LEGAL ARGUMENT

I. MCL 213.55(3) DOES NOT REQUIRE NOTICE THAT A LANDOWNER WILL SEEK JUST COMPENSATION FOR A TAKING OF PROPERTY BASED UPON A HIGHER AND BETTER USE IN ACCORDANCE WITH A POTENTIAL REZONING OF THE PROPERTY.

As noted previously, the trial court refused to consider Defendant Echo 45, LLC's claim that the highest and best use of its property would be use for professional office purposes, and that this property should therefore be valued in accordance with that use in determining the value of the property taken and the reduction in the value of its remaining property. This refusal was based upon the court's finding that Defendant's proposed valuation of the property in accordance with this potential higher and better use was a claim which should have been disclosed to the condemning authority pursuant to MCL 213.55(3), and was therefore barred by Defendant's failure to do so. Although the Court of Appeals has acknowledged that a landowner is entitled to compensation based upon a "reasonable possibility of rezoning," it has affirmed the trial court's decision, expressing its conclusion that Defendant's claim was a claim for "compensable damages" which must be disclosed in accordance with that provision.

With all due respect to the lower courts, Defendants contend that this finding was clearly erroneous under the circumstances presented in this case. MCL 213.55(3) does not require notice that a landowner will seek just compensation for a taking of property based upon a higher and better use in accordance with a potential rezoning of the property. The erroneous exclusion of this important evidence has denied Defendant Echo 45, LLC a fair valuation of its property, resulting in a grossly deficient award of just compensation.

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A. THE STANDARDS OF REVIEW

To the extent that the trial court's decision was based upon interpretation of MCL 213.55(3), its decision is reviewed *de novo*. It is well settled that questions of statutory construction and other questions of law are reviewed *de novo*. Halloran v Bhan, 470 Mich 572; 683 NW2d 129 (2004); Bartlett v North Ottawa Community Hospital, 244 Mich App 685; 625 NW2d 470 (2001) *lv den*, 465 Mich 907 (2001)

To the extent that the trial court's decision was based upon a factual finding that the proposed valuation was not disclosed within an extension of time allowed pursuant to the court's Scheduling Order, or that the circumstances did not constitute "good cause" for an extension of time, or that the rights of the condemning authority would have been prejudiced by an extension of the time allowed under MCL 213.55(3), its decision is reviewed for clear error. It has also become well settled that factual findings of the trial court sitting without a jury are reviewed under the "clearly erroneous" standard of review. Under that standard, findings of fact are deemed clearly erroneous where the reviewing court is "left with a definite and firm conviction that a mistake has been made." Begola Services, Inc. v Wild Brothers, 210 Mich App 636, 639; 534 NW2d 217 (1995) *lv den*, 451 Mich 876 (1996)

B. IN CONDEMNATION CASES, THE LANDOWNER IS ENTITLED TO AN AWARD OF JUST COMPENSATION BASED UPON THE HIGHEST AND BEST USE OF THE PROPERTY.

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An award of just compensation in a condemnation action must put the landowner in as good a position as he would have been in if the taking had not occurred. The determination of value in each case is not a matter of formula or artificial rule, but of sound judgment and discretion based upon the relevant facts. State Highway Commissioner v Eilender, 362 Mich 697, 699; 108 NW2d 755 (1961) Accordingly, it has become well settled in Michigan that in

condemnation cases, the landowner is entitled to receive compensation based upon the highest and best use of the property involved. The "highest and best use" means the most profitable and advantageous use the owner may make of the property, even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use. St. Clair Shores v Conley, 350 Mich 458, 462; 86 NW2d 271 (1957); In Re Condemnation of Lands in Battle Creek, 341 Mich 412, 421-422; 67 NW2d 49 (1954); M Civ JI 90.09.

C. PROPER CONSIDERATION OF A PROPERTY'S HIGHEST AND BEST USE INCLUDES CONSIDERATION OF REASONABLE POSSIBILITIES FOR REZONING.

Consistent with the principle that a landowner is entitled to compensation based upon the highest and best use of the property, the reported decisions have also made it clear that it is appropriate to consider reasonable possibilities of rezoning for such uses. It is not necessary for the landowner to show an accomplished rezoning, or even a probability that rezoning will occur; if there is a reasonable **possibility** that the zoning classification will be changed, that possibility should be considered in arriving at the proper value. State Highway Commissioner v Eilender, *supra*, 362 Mich at 699; M Civ JI 90.10.

D. THE TRIAL COURT IMPROPERLY DENIED DEFENDANT ECHO 45, LLC THE OPPORTUNITY TO PROVE THAT ITS PROPERTY SHOULD BE VALUED IN ACCORDANCE WITH ITS HIGHEST AND BEST USE FOR PROFESSIONAL OFFICE USE.

The trial court refused to consider Defendant Echo 45, LLC's claim that the highest and best use of its property would be use for professional office purposes, based upon its finding that this was a claim which should have been disclosed to the condemning authority pursuant to MCL 213.55(3). Again, with all due respect to Judge Eveland and the Court of

Appeals panel which upheld his decision, Defendant Echo 45, LLC contends that this provision has been seriously misconstrued.

MCL 213.55(3) requires that notice be given to the condemning authority when the owner believes that the good faith written offer did not include, or fully include, "1 or more items of compensable property or damage" for which the owner intends to claim a right to just compensation:

> "**If an owner believes that the good faith written offer made under subsection (1) did not include or fully include 1 or more items of *compensable property or damage* for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency.** The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and to determine its value. **The owner shall file all such claims within 90 days after the good faith written offer is made pursuant to section 5(1) or 60 days after the complaint is filed, whichever is later.** Within 60 days after the date the owner files a written claim with the agency, the agency may ask the court to compel the owner to provide additional information to enable the agency to evaluate the validity of the claim and to determine its value. **For good cause shown, the court shall, upon motion filed by the owner, extend the time in which claims may be made, if the rights of the agency are not prejudiced by the delay.** Only 1 such extension may be granted. After receiving a written claim from an owner, the agency may provide written notice that it contests the compensability of the claim, establish an amount that it believes to be just compensation for the item of property or damage, or reject the claim. If the agency establishes an amount it believes to be just compensation for the item of property or damage, the agency shall submit a good faith written offer for the item of property or damage. The sum of the good faith written offer for all such items of property or damage plus the original good faith written offer constitutes the good faith written offer for purposes of determining the maximum reimbursable attorney fees under section 16. **If an owner fails to file a timely written claim under this subsection, the claim is barred.** If the owner files a claim that is frivolous or in bad faith, the agency is entitled to recover from the owner its actual

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and reasonable expenses incurred to evaluate the validity and to determine the value of the claim." (Emphasis added)

Defendant Echo 45, LLC contends that the notice requirement of MCL 213.55(3) was inapplicable because its proposed valuation of the property in accordance with its highest and best use as professional office property was not an excluded or incompletely included claim, to which that requirement may be applied. As noted previously, property **must** be valued in accordance with its highest and best use in determining an award of just compensation. That is the law, and Plaintiff's appraiser, Mr. Vertalka, has freely acknowledged that this is so. (T. Vol. II, p. 86) Accordingly, it is clear that Mr. Vertalka was required to determine the highest and best use of Defendant's property and value it accordingly.

Mr. Vertalka's appraisal reports, admitted as Plaintiff's Exhibits 2, 5, and 9, reveal that he **did** determine the highest and best use for each of the properties. Those reports also indicate that he had evaluated each parcel for damage to the remainder, and found none.[15] With regard to the Echo 45, LLC property, Mr. Vertalka found that the highest and best use was for residential purposes. (Appendix "S") Thus, it may be seen that Plaintiff's appraisal did not overlook the obligation to determine the highest and best use and to value the property accordingly. Thus, Defendant's proposed valuation of the property for professional office use was not an assertion of a claim concerning "an item of compensable property or damage" that had been overlooked or incompletely included; it was, instead, a point of disagreement between two appraisers offering conflicting opinions as to the highest and best use of the property at issue and the resulting valuations of that property. It is, of course, natural and expected that differences of opinion will arise between opposing appraisal experts as to

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[15] Pertinent excerpts from Mr. Vertalka's appraisal reports are submitted herewith as Appendices "Q," "R," and "S."

valuation in condemnation litigation. A manifestation of such a disagreement cannot be deemed an assertion of a separate claim for purposes of MCL 213.55(3).

The trial court's decision appears to have been based primarily upon the Court of Appeals' decision in City of Novi v Woodson, 251 Mich App 614; 651 NW2d 448 (2002). Defendant Echo 45, LLC contends that the court's reliance upon that decision was misplaced, as its pertinent facts are dramatically different. In Woodson, the landowner provided a notice that it was reserving the right to assert a variety of claims for just compensation, including a claim for business interruption damages. The present case differs in two important respects. First, the Court of Appeals' decision in Woodson was based primarily upon its finding that merely reserving the right to make a claim later did not satisfy the statute's requirement that notice of an excluded claim actually be given.

Second, and perhaps most important with regard to this case, the claim at issue in Woodson – a claim for business interruption damages – did not involve a criteria which should necessarily have been taken into account by the condemning authority in determining its good faith offer. In this case, Plaintiff's appraiser was required to determine the highest and best use and value the property accordingly. Mr. Vertalka's report (Appendix "S") indicates that he **did** determine the highest and best use. Defendant disagreed with his determination, as revealed in the report and testimony of its appraisal expert, Mr. Essa. This difference of opinion can hardly be deemed a separate claim, nor is it something which should have been unexpected in this case.

Plaintiff has maintained that there is no difference between the potential for rezoning of the Echo 45, LLC parcel and the claim for damages for business interruption presented in Novi v Woodson, *supra*. This argument lacks merit because it conflates two different legal

concepts – value and damage. As Defendant Echo 45, LLC has noted previously, the potential for rezoning is part of its claim that the highest and best use of its property would be use for commercial office development. And, as Defendants have also noted, and Plaintiff's appraiser has specifically acknowledged, **the value of property taken must be determined in accordance with the highest and best use when determining just compensation**. The "highest and best use" means the most profitable and advantageous use the owner may make of the property, even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use. St. Clair Shores v Conley, *supra*, 350 Mich at 462; In Re Condemnation of Lands in Battle Creek, *supra*, 341 Mich at 421-422; M Civ JI 90.09.

Thus, it is clear that Defendant Echo 45 LLC's claim regarding potential rezoning was **an element of the value of the property taken**. The claim for damages for business interruption in Novi v Woodson, *supra,* was a claim for compensation of an entirely different nature – a claim for **damages flowing from the taking of the property**. As noted previously, just compensation is the amount of compensation which will put the person whose property has been taken in as good a position as he or she would have been in had the taking not occurred. State Highway Commissioner v Eilender, *supra* , 362 Mich at 699; M Civ JI 90.05. This includes all elements relating to the **value** of the property taken, as well as elements of **damage** flowing from the taking itself. *See:* Silver v Creek Drain District, 468 Mich 367, 378-379; 663 NW2d 436 (2003); In Re Grand Haven Highway, 357 Mich 20; 97 NW 2d 748 (1959). The possibility of rezoning, related, as it is, to the determination of highest and best use, is an element of the value of the property taken. Elements of damage

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include damage to the remainder for loss of value of adjacent property not taken, and damages for business interruption,[16] as claimed in Novi v Woodson, *supra.*

Again, MCL 213.55(3) addresses situations where a landowner believes that the good faith written offer has not included, or fully included "1 or more items of compensable **property or damage**" for which the owner intends to claim a right of just compensation:

> "If an owner believes that the good faith written offer made under subsection (1) did not include or fully include **1 or more items of compensable property or damage** for which the owner intends to claim a right to just compensation, the owner shall, for each item, file a written claim with the agency. . ." (Emphasis added)

A case involving an overlooked or under-included "item" of property might include, for example, a case where an appraisal supporting the good faith offer does not include a portion of the property to be taken, or overlooks a building or other improvement.[17] Cases involving an overlooked or under-included "item" of damage could include situations where the landowner seeks damages for business interruption or a reduction in the value of his remaining property not anticipated by the condemning authority's appraiser.

Defendant Echo 45, LLC's claim regarding potential rezoning does not involve an "item of compensable property" not included, or less than fully included, in Plaintiff's offer. It is not disputed that the "good faith" offer correctly identified all of the Echo 45, LLC property ultimately taken in this case, and purported to determine its value for purposes of just

[16] Business interruption damages are, at law, personalty, not realty, and thus, are not a part of the condemned real property. Value associated with rezoning is part of the value of the real property being taken in a condemnation action, and thus, it may be seen that the pertinent facts in Woodson are very different from those appearing here.

[17] MCL 213.51(i) defines "property" as "land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights whether real, personal, or mixed, including fluid mineral and gas rights."

compensation. Nor is this a claim concerning "damage" flowing from the taking. It is, instead, a claim relating solely to the **value of the property taken** – a claim that this value was erroneously determined by Plaintiff's appraiser because Plaintiff's offer did not value the property according to its highest and best use, as Plaintiff's appraiser has conceded was required.[18] Thus, Defendant Echo 45, LLC's claim that the highest and best use of its property was use for commercial office development was merely a point of disagreement as to the correct valuation of the property correctly identified by Plaintiff's offer as the property to be taken – a disagreement which Defendant claims has resulted from a defect in the valuation methodology employed by Plaintiff's appraiser. That defect, and the resulting disagreement, are not matters to which MCL 213.55(3) may properly be applied. Thus, Plaintiff's reliance upon Novi v Woodson, *supra,* is clearly misplaced.

If the notice requirement of MCL 213.55(3) is deemed ambiguous, the Legislature's intent may be gleaned from the language of related statutory provisions and the available legislative history.[19] This evidence, discussed in greater detail below, clearly suggests that the Legislature understood the important distinction between a difference of opinion as to an element of value of the property taken, on the one hand, and an omitted "item" of "property" or "damage" on the other. This distinction support's Defendants' position that the difference

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[18] Indeed, if carried to its illogical conclusion, Plaintiff's argument would require a landowner to give notice under MCL 213.55(3) in any case where the condemning authority's appraiser came to a lower conclusion of value than the owner, even if the condemning appraiser missed no elements of damages.

[19] Legislative history relevant for this purpose includes legislative analyses and journals chronicling amendments and legislative debate. *See*: In Re Certified Question from the United States Court of Appeals for the Sixth Circuit, 468 Mich 109, 114-115; 659 NW 2d 597 (2003); Department of Transportation v Thrasher, 196 Mich App 320, 323; 493 NW 2d 457 (1992), *aff'd* 446 Mich 61 (1994).

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of opinion between the competing appraisal experts as to the highest and best use of the property at issue in this case does not constitute a claim to which MCL 213.55(3) applies.

The Court should note, in this regard, that the language of MCL 213.55(3) provides its own support for this conclusion. The statute provides that, after receiving notice of a claim concerning an overlooked or under-included "item" of compensable property or damage, the agency may submit a separate good faith offer for that item of property or damage. In that event, the sum of the good faith written offer for all such items of property or damage plus the original good faith written offer constitutes the good faith written offer for purposes of determining the maximum reimbursable attorney fees:

> ". . . After receiving a written claim from an owner, the agency may provide written notice that it contests the compensability of the claim, establish an amount that it believes to be just compensation for the item of property or damage, or reject the claim. **If the agency establishes an amount it believes to be just compensation for the item of property or damage, the agency shall submit a good faith written offer for the item of property or damage. The sum of the good faith written offer for all such items of property or damage plus the original good faith written offer constitutes the good faith written offer for purposes of determining the maximum reimbursable attorney fees under section 16.** If an owner fails to file a timely written claim under this subsection, the claim is barred. If the owner files a claim that is frivolous or in bad faith, the agency is entitled to recover from the owner its actual and reasonable expenses incurred to evaluate the validity and to determine the value of the claim." (Emphasis added)

This separate valuation of overlooked or under-included items of property or damage is consistent with the notion that the notice provision of subsection 55(3) was not intended to apply to differences of opinion among appraisers as to key elements affecting the value of the property taken. It is logical to assume that the Legislature would have required a new good faith offer, encompassing all essential elements of just compensation for the taking, if the Legislature had intended for this notice provision to apply in such cases.

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The Court should also note, in this regard, that timely disclosure of appraisals and the basis for the opinions expressed therein, is promoted by a separate statutory provision. MCL 213.61 requires, upon motion of either party, that the court issue a scheduling order to assure that appraisal reports are exchanged, and that the parties are afforded a reasonable opportunity for discovery before a case is submitted to mediation, alternative dispute resolution or trial. An appraisal report provided pursuant to such an order must "fairly and reasonably describe the methodology and basis for the amount of the appraisal." Failure to comply with these requirements may bar the testimony of an offending party's appraisal expert:

> "1) Upon motion of either party, the court shall issue a scheduling order to assure that the appraisal reports are exchanged and the parties are afforded a reasonable opportunity for discovery before a case is submitted to mediation, alternative dispute resolution, or trial.
>
> "(2) An appraisal report provided pursuant to this section shall fairly and reasonably describe the methodology and basis for the amount of the appraisal. If the testimony or opinion of a person relating to the value of real property would require a license under article 26 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.2601 to 339.2637 of the Michigan Compiled Laws, the appraisal shall comply with section 2609 of Act No. 299 of the Public Acts of 1980, being section 339.2609 of the Michigan Compiled Laws, and the standards adopted under section 2609 of Act No. 299 of the Public Acts of 1980 and the person shall not be permitted to testify or otherwise render an opinion relating to the value of real property unless the person is licensed under that article. An owner is not required to be licensed or to comply with professional appraisal standards to testify to the value of the owner's property.
>
> "(3) The court may issue orders to facilitate compliance with this section, including but not limited to orders to require mutual simultaneous exchange of the agency's updated appraisal report, if any, and the owner's appraisal report. If an appraisal report has not been provided pursuant to this section, the appraisal report shall not be considered in mediation or alternative dispute resolution proceedings unless specifically authorized by court order. If an appraisal report has not been provided pursuant to this section, the court may bar the taking of appraisal testimony from the appraisal expert, unless the court finds good cause for the failure and finds that the interests and opportunity of the other party to prepare have not been prejudiced."

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It is noteworthy that these requirements were added to MCL 213.61 by 1996 P.A. 474, created by the enactment of Senate Bill 778 – **the same amendatory Act which added MCL 213.55(3)**. As originally introduced, the Senate Bill 778 proposed amendments to MCL 213.61 similar to the requirements provided in that section today, but did not include the notice requirement now provided in MCL 213.55(3).[20] The notice requirement of subsection 55(3) was added to the Bill Substitute which was ultimately passed by the Senate, and subsequently approved by the House of Representatives. The Senate Fiscal Agency's Enrolled Analysis of Senate Bill 778[21] suggests that there were two primary purposes for the notice requirement of subsection 55(3): 1) To prevent agencies from being surprised by new claims at trial, and 2) To reduce the potential liability of condemning agencies for attorney fees. It also reflects an expectation that the new notice provision would have beneficial effects for both condemning agencies and landowners. The Enrolled Analysis recites, as arguments made in support of the Bill, that:

> "The bill will expedite the condemnation process, reduce litigation, and save money for both the government and property owners. First, it allows agencies to obtain information from an owner, before making the initial offer. If an offer omitted some item of damage or compensation, the owner must give the agency written notice of the omission, along with sufficient information for the agency to evaluate the claim. The agency may then make a supplemental offer for the omitted item. With this additional information, agencies will be able to make more accurate, often larger, good faith offers. **An agency will no longer be surprised by new claims at trial, or be confronted with the owner's one-third attorney fee claim on items left out of the offer due to mistake or lack of information. Both the property owner and the agency will benefit.**"
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> (Appendix "W" p. 5 – Emphasis added)

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[20] A copy of Senate Bill 778, as introduced, is submitted herewith as Appendix "U." A copy of the Committee Analysis of the Bill, as introduced, is submitted herewith as Appendix "V."

[21] The Senate Fiscal Agency's Enrolled Analysis of Senate Bill 778 is submitted herewith as Appendix "W."

All of this suggests that the primary purpose of the new notice provision was to provide needed protection for condemning agencies against unfair surprise. There is no support for any assumption that it was intended for use as a sword, to defeat a landowner's legitimate claim for just compensation, properly based upon the highest and best use of the property at issue. As noted previously, the condemning authority is always required to make a determination of the highest and best use of the property, and to value the property accordingly. In making that determination, the condemning authority must anticipate that the landowner's appraiser might disagree as to this essential element of value, and thus, such a disagreement cannot be considered an unfair surprise.

The Court should note, in this regard, that Plaintiff's proposed interpretation of MCL 213.55(3) would place an unreasonable burden upon landowners who lack the professional expertise required for determining the highest and best use of property. Appraisal experts are uniquely qualified to make that determination, but most landowners are not. The Court should bear in mind that, in many cases, the time limitation for filing a notice under subsection 55(3) may expire before the time established for the exchange of appraisal reports under MCL 213.61. In that event, if Plaintiff's interpretation of the statute is sustained, the landowner could be required to make the determination of highest and best use which should properly be reserved for an appraisal expert in order to preserve his claim for just compensation based upon the highest and best use of the property **before** the appraiser has had a reasonable opportunity to complete his valuation.

It is difficult, indeed, to imagine how the Legislature could have intended such an unfair and illogical result. It is reasonable to assume that a landowner will notice if the condemning authority's good faith offer has overlooked a portion of the property to be taken.

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It is also reasonable to assume that the landowner will take notice if a building or other improvement has been overlooked or excluded, in whole or in part. It is also reasonable to assume that the landowner will have knowledge of business interruption expenses that he will incur as a result of the taking, and will foresee a resulting diminishment of the utility or value of adjacent property not taken. It is not unreasonable to require the landowner to make timely claims for these elements of just compensation. It **is** unreasonable to expect a landowner to be an appraiser. This, however, would be the anomalous result of the construction proposed by the Plaintiff and adopted by the lower courts in this case. The Defendants respectfully suggest that this Court should seize the opportunity to declare that this was not the intended purpose of MCL 213.55(3) by granting their application for leave to appeal, or other appropriate peremptory relief, in this case.

Defendants' Motion for Reconsideration asserted that, if Defendants' claims regarding potential rezoning and damages to the remainder were, indeed, claims which should have been disclosed pursuant to MCL 213.55(3), the disclosure of those claims in the appraisal reports submitted in accordance with the court's Scheduling Order should have been deemed a timely and sufficient disclosure under an extension granted by the court. Defendant Echo 45, LLC contends that reconsideration should have been granted in full, and the evidence of its proposed valuation allowed, even if its proposed valuation did constitute a claim which should have been disclosed under MCL 213.55(3).

As the trial court noted in its Opinion of September 17, 2003 (Appendix "G"), Defendant's proposed valuation of the property as professional office property was disclosed in Defendant's first appraisal report, submitted on June 30, 2003. This disclosure allowed ample time before trial for the Plaintiff and its appraisal expert to explore this evaluation, and

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to refute or concur in it. Plaintiff did not concur, of course. Its response, after exploring Mr. Essa's opinion in deposition testimony, was to seek exclusion of his proposed valuation based upon the alleged noncompliance with § 213.55(3).

The language of § 213.55(3) imposes a mandatory obligation to grant an extension for good cause: "For good cause shown, the court shall upon motion filed by the owner, extend the time in which claims may be made, if the rights of the agency are not prejudiced by the delay." Here, no motion for extension was filed because Defendants had no suspicion that these were claims which should have been disclosed pursuant to § 213.55(3). Clearly, there would have been no prejudice to the Plaintiff if the trial court had granted an extension and allowed the presentation of this important evidence. Its refusal to do so has denied Defendant Echo 45, LLC a fair valuation of its property, and should therefore be reversed.

II. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO DAMAGE TO THE REMAINING PROPERTY ON THE PARCELS OWNED BY DEFENDANT LAND ONE, LLC.

As noted previously, the trial court reconsidered its original decision to exclude all evidence of damage to the remaining properties, and thus, it heard and considered evidence of damage to the remainder with regard to the industrial and commercially-zoned properties owned by Defendant Land One, LLC. The court concluded, however, that no award for damage to the remainder was warranted as to either of those properties. Defendant Land One, LLC contends that this finding was clearly and manifestly erroneous in light of the overwhelming evidence that considerable portions of these properties were rendered inaccessible or entirely useless by the taking. Accordingly, they contend that the Judgments entered in Case Nos. 03-067-CC and 03-069-CC should be reversed.

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A. THE STANDARD OF REVIEW

As noted previously, factual findings of a trial court sitting without a jury are reviewed under the "clearly erroneous" standard of review. Under that standard, findings of fact are deemed clearly erroneous where the reviewing court is "left with a definite and firm conviction that a mistake has been made." Begola Services, Inc. v Wild Brothers, *supra*.

B. THE TRIAL COURT CLEARLY ERRED IN FINDING NO DAMAGE TO THE REMAINDER IN THESE CASES.

In cases of a partial taking of property, the landowner is entitled to compensation for any reduction in the value of his or her remaining property caused by the taking. State Highway Commissioner v Schultz, 370 Mich 78; 120 NW2d 733 (1963); State Highway Commissioner v Walma, 369 Mich 687; 120 NW2d 833 (1963); M Civ JI 90.12. In determining he value of the property not taken, the trier of fact may properly consider several factors, including: 1) Its reduction in size; 2) Its altered shape; 3) Reduced access; 4) Any change in utility or desirability of what is left after the taking; 5) The effect of applicable zoning ordinances on the remaining property; and 6) The use that the condemning authority will make of the property taken, and the effect of that use upon the remaining property. M Civ JI 90.12. This is the law, and Plaintiff's appraiser, Mr. Vertalka, has freely acknowledged that this is so. (T. Vol. II pp. 87-88, 101-102)

The evidence has shown that substantial portions of Defendant's remaining property have been rendered inaccessible or useless as a result of the flooding easements taken in these cases. This has been illustrated, most convincingly, by Plaintiffs' Exhibits 26 and 27 (Appendices "N" and "O"), which have shown that two considerable parcels of property – a 3.16 acre area within the industrially-zoned parcel and a 4.8 acre area within the

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commercially-zoned parcel – have become landlocked. These drawings corroborate Mr. Eyde's testimony that these areas were easily accessible before the taking, but inaccessible afterward. As Mr. Eyde noted, it would have been simple to gain access to these areas before the taking by crossing narrow strips of wetland, depicted by red broken lines in Plaintiff's Exhibits 26 and 27 (Appendices "N" and "O"). Mr. Eyde has testified that a culvert would have sufficed for this purpose before the taking. Afterward, it will require construction of a bridge. (T. Vol. V, p. 99) This, also, has been well illustrated by Plaintiff's Exhibits 26 and 27 (Appendices "N" and "O"), in which the broad flooding easements have been depicted by a solid blue line.

It has been undisputed that these easements will remain flooded or wet at all times; that is why compensation has been paid for them. Thus, as aptly illustrated by the aforementioned drawings, these large areas will now be inaccessible for all practical purposes. They certainly cannot be developed in any way if they are not accessible for vehicular travel. Defendant's evidence has also shown that these parcels did have potential for development, and thus, were valuable, before the taking. (T. Vol. V, pp. 41-43, 62-63) Indeed, with regard to the 4.8 acre parcel on the commercially-zoned property, Mr. Eyde has testified that this property was accessible, had utilities available, and "would have been really good for hillside development" before the taking. (T. Vol. V, pp. 62-63)

In light of this evidence, the trial court clearly erred in finding that there was no damage to the remainder in these cases. As a result of that erroneous conclusion, the award of just compensation to Defendant Land One, LLC was grossly deficient, and should therefore be reversed.

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RELIEF

WHEREFORE, Defendants–Appellants Land One, L.L.C. and Echo 45, L.L.C. respectfully request that this Honorable Court grant their application for leave to appeal, or other appropriate peremptory relief.

Respectfully submitted,

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